

LATEST PAYMENT DECISION: COMPLIANCE WITH IMMEDIATE PAYMENT OBLIGATIONS IS (ALMOST ALWAYS) REQUIRED BEFORE A TRUE VALUE ADJUDICATION

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Following the important decisions in Grove last year, we review the latest judgment on payment and adjudications from the Technology and Construction Court (the TCC) in M Davenport Builders Ltd v Greer and another [2019].

The message from the court is clear: comply with your immediate payment obligations before pursuing a true value adjudication.

Background

- Davenport was appointed by the Greers to carry out construction works at a building in Stockport. In terms of payment and the right to adjudicate, the Scheme for Construction Contracts 1996 as amended (the Scheme) applied.
- A dispute arose relating to the final account and two adjudications followed.

Adjudication 1:

An adjudication decision by Mr Sutcliffe awarding Davenport a little over £106,160 plus interest (the Sutcliffe adjudication) - this was the amount demanded in Davenport's final account (plus interest).

This decision flowed from the Greers' failure to issue payment/pay less notices following Davenport's final account payment application. In other words, this was an adjudication decision based on a failure by the employer to follow the payment provisions prescribed in the Scheme - often known as a "smash and grab" adjudication.

Adjudication 2:

An adjudication decision by Mr Sliwinski dated 30 November 2018 - this adjudication was commenced by the Greers on 30 October 2018 (the Sliwinski adjudication). The decision dated 30 November 2018 concluded that the gross value of the final account was just over £867,500 excluding VAT and that no amount was due from Davenport to the Greers. Each side would pay 50% of the adjudicator's fees. VAT should be paid if appropriate.

This second adjudication was a "true value" adjudication.

- The Greers did not pay the amount awarded in the Sutcliffe adjudication.

TCC Proceedings

Davenport commenced proceedings in the Technology and Construction Court (the TCC) to enforce Mr Sutcliffe's award.

- The Greers relied on the Sliwinski decision by way of set off or counterclaim.
- Davenport contended that the Greers could not rely on the Sliwinski decision as they had failed to pay the Sutcliffe award before commencing the Sliwinski adjudication. This was refuted by the Greers.

The key issue in this case was therefore whether or not the Greers could commence and/or rely upon a true value adjudication (here the Sliwinski adjudication) where the Greers had not already paid the amount awarded in the Sutcliffe adjudication.

TCC Decision

Mr Justice Stuart-Smith gave summary judgment for Davenport enforcing Mr Sutcliffe's decision. In doing so, he concluded that the Greers had "not discharged [their] immediate obligation to pay the sums ordered by Mr Sutcliffe and may not rely upon the subsequent [Sliwinski] decision". The Greers were therefore ordered to pay the amount of just over £106,160 plus interest awarded by Mr Sutcliffe to Davenport. The Greers could not rely on a set-off flowing from the Sliwinski decision as they had not made the immediate payment required by the Scheme.

Two clear findings were made by Mr Justice Stuart-Smith in his judgment:

1. "it should now be taken as established that an employer who is subject to an immediate obligation to discharge the order of an adjudicator based upon the failure of the employer to serve either a Payment Notice or a Pay Less Notice must discharge that

immediate obligation **before** he will be entitled to rely upon a subsequent decision in a true value adjudication" emphasis added; and

2. this principle applies both to interim and to final applications for payment.

In his considerations, the Judge drew heavily from earlier case law, and in particular, the judgment of the Court of Appeal (the CA) in *Grove Developments Limited v S&T (UK) Limited* [2018], reviewed in our [update](#) in November 2018.

Although the relevant section of the CA's decision in *Grove* was actually obiter (not essential to the decision and therefore not legally binding), whilst acknowledging this, Mr J Stuart-Smith in *Davenport v Greer* considered that the CA had "expressly intended to provide authoritative guidance". Lord Justice Jackson in the CA judgment in *Grove* said:

"both [the Act] and the contract [prohibit] the employer from embarking upon an adjudication to obtain a re-valuation of the work before he has complied with his immediate payment obligation....".

Mr J Stuart-Smith was clear in his view: "[t]he decisions of Coulson J and the Court of Appeal in *Grove* are clear and unequivocal in stating that the employer must make payment in accordance with the contract or in accordance with section 111 of the Amended Act before it can commence a 'true value' adjudication". Mr J Stuart-Smith also stated that:

- he agreed with the CA judgment in *Grove* on this issue; and
- even if he had not agreed with it, he would have felt obliged to follow it, despite it being obiter.

The Judge went on to emphasise that this finding (pay first, then adjudicate on the true value of the works) does not mean that the court will always restrain a true value adjudication commenced before the immediate payment obligation has been discharged by the employer. He did not, however, consider it appropriate to specify the exact circumstances when the court may/may not restrain a true value adjudication.

Commentary

This decision builds on the CA judgment in *Grove* and sets out clear requirements in terms of compliance with the payment obligations made mandatory by the Act, before pursuing a true value adjudication. There may be exceptions to this principle, but in order to avoid wasting time and costs, in most situations, payment should be made in accordance with the Act before the true value is challenged.

Practically, the answer is to ensure that relevant payment and pay less notices are served in accordance with the contract (or in default, the Scheme) - if you fail to do this, you will have to pay immediately the amount set out in the payment application (whether or not you agree with the claim), and fight it out later in terms of the true value of the works.

This applies to both interim and final account applications - the approach of the court will be the same. Mr J Stuart-Smith gave this reasoning:

"It is true that the maintenance of cashflow after the works are completed is not necessary to fund the continuation of the works themselves; but the need for cashflow in the construction industry is not limited to a particular contract: payments at the end of a particular contract may be vital to enable the contractor to continue to operate going forward, quite apart from the need to fund the continuing obligation to make good or complete works under the contract in question. In other words, deprivation of cashflow may have a serious adverse influence on a contractor whether it occurs during or at the end of the works."

As ever, ensuring that you understand the payment obligations and keep to the specified notice and timescale requirements will protect your position, and cashflow.

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